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## CHANGES IN ORGANIZATION AND PROCEDURES OF THE NLRB

### ORGANIZATION OF THE BOARD

**A**S A RESULT of the enactment of the Labor Management Relations Act,<sup>1</sup> the National Labor Relations Board (NLRB) has undergone changes in its organizational structure and procedures. The membership of the Board has been increased from three to five. Three members constitute a quorum at all times. The Board may delegate any of its powers to any group of three, and when this occurs, a quorum consists of two members.

The General Counsel of the Board is appointed by the President by and with the consent of the Senate. He has general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over officers and employees in the regional offices. He has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board. . . ." The Board, however, has the primary responsibility for handling representation cases and union-shop authorization elections under Section 9 of the Act. Because the General Counsel has general supervision over officers and employees in the regional offices who process the representation and union-shop authorization cases, there is an apparent overlapping of authority.

The main functions of the Board are to act in the capacity of a rule-making body and to decide cases upon formal records. Before the Taft-Hartley Law was passed, the Board established a Review Division to aid in its adjudicating function. The division analyzed records, reported cases to the Board and drafted opinions. The Review Division was eliminated by language in Section 4 (a) of the Act:

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<sup>1</sup> 61 STAT. 136 (1947), 29 U. S. C. 1946 ed. Supp. III, §§ 141-197. The principal changes in structure are to be found in §§ 3 and 4.

"The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts."

Thus, the burden of reviewing records and writing decisions is definitely placed upon the Board members.

The Congress was intent upon insuring that the adjudicating function should not be combined or associated with the prosecuting function. The trial examiner's report cannot be reviewed by any person "other than a member of the Board or his legal assistant, and no trial examiner . . . [may] advise or consult with the Board with respect to exceptions taken to his findings, rulings or recommendations."

The General Counsel of the NLRB has final authority to decide whether or not a complaint should issue on a charge of unfair labor practice. But it appears that whether or not the Board will take jurisdiction and issue an order is for the Board ultimately to decide.<sup>2</sup>

The Office of the General Counsel has been organized into four divisions. The Division of Law is the legal department. The Division of Operations supervises the various regional offices. Review of dismissals of complaints and recommendation of general policy measures are done in the Division of Policies and Appeals. The Division of Administration deals with fiscal matters, prepares statistical reports and handles personnel matters.

#### PETITION FOR ELECTION

Representation proceedings may now be instituted (1) by petition of employees or a labor representative or organization alleging that a substantial number of employees wish to be represented for collective bargaining and that their employer declines to recognize their representative as the majority choice; (2) by petition

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<sup>2</sup> *Haleston Drug Stores v. N. L. R. B.*, 187 F. 2d 418 (9th Cir. 1951).

of employees or a labor organization asserting that the presently recognized or certified representative is no longer the majority choice; or (3) by petition of the employer alleging that one or more individuals or labor organizations make claim to be recognized as the collective bargaining representative.<sup>3</sup> The first type of petition was provided for under the original Wagner Act (NLRA). The second type petition is new and leads to "decertification." The third type enlarges the right of employers to commence representation proceedings. The Rules and Regulations of the NLRB just prior to passage of the Labor Management Relations Act permitted an employer to file a petition only where two or more unions were making conflicting claims to rights of representation.<sup>4</sup>

Before the Board may proceed with any of these petitions, it must have "reasonable cause to believe that a *question of representation* affecting commerce exists." (Italics added.) If no union claims to represent a majority of the employees, no question of representation exists, and the Board must dismiss the petition.<sup>5</sup> Disclaimer of majority standing eliminates a fact essential to the jurisdiction of the Board. The Board has said that where disclaimer is made, continuation of the proceedings would ordinarily be a waste of time and effort. Further, if an election were held, under Section 9 (c) (3) no subsequent election could be held for twelve months.

The hearing of a representation proceeding is conducted by an officer or employee in the appropriate regional office, and he transmits the record to the NLRB without recommendations. The Board then decides on the record whether a question of representation

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<sup>3</sup> § 9(c).

<sup>4</sup> Matter of Kraft Foods Company, 83 N. L. R. B. 331 (1949); Matter of Coca-Cola Bottling Co. of Walla Walla, Washington, 80 N. L. R. B. 1063 (1948).

<sup>5</sup> Matter of Griffin Hosiery Mills, Inc., d/b/a Dove Down Hosiery Mills, 83 N. L. R. B. 1240 (1949); Matter of Merchants Fire Dispatch, 83 N. L. R. B. 788 (1949); Matter of Murray B. Marsh Company, Inc., 79 N. L. R. B. 76 (1948); Matter of Federal Shipbuilding and Drydock Company, 77 N. L. R. B. 463 (1948); Matter of Tabardrey Manufacturing Company, 51 N. L. R. B. 246 (1943).

exists, and if such question exists, an election by secret ballot must be directed. Eliminated is the former practice whereby a regional director could order an election after investigating a petition for certification. Election by secret ballot was uniformly used by the NLRB before enactment of the Taft-Hartley Act, but it was not mandatory under the Wagner Act.

The NLRB continues reluctant to settle a dispute concerning representation between two (or more) unions affiliated with the same parent organization. But if the dispute cannot be resolved by the parent organization, the Board will settle the issue.<sup>6</sup>

Section 9 (c) (3) prohibits an election in any bargaining unit or subdivision within which, in the preceding twelve-month period, a valid election has been held. This has introduced an inflexible feature into the practice of the Board, which was commented upon in *Matter of Western Electric Company*.<sup>7</sup> In this case the Board ordered an election, realizing that it could not provide for another election six months after certification, as had been its practice where the number of employees in the unit was increasing at a rapid rate.

Section 9 (c) (3) declares that "employees on strike who are not entitled to reinstatement shall not be eligible to vote." Thus, employees who have taken part in an "economic" strike and who have been permanently replaced are not eligible to vote. Under the Wagner Act the Board allowed "economic" strikers to vote even though they had been replaced because of the broad definition of "employee" as "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute."<sup>8</sup> Of course, strikers because of unfair labor practices remain eligible to vote.

The majority rule continues to prevail in elections under Sec-

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<sup>6</sup> *Matter of Gerity Michigan Corporation*, 78 N. L. R. B. 94 (1948); *Matter of Pacific Car and Foundry Company*, 76 N. L. R. B. 32 (1948).

<sup>7</sup> 76 N. L. R. B. 400 (1948).

<sup>8</sup> *Matter of Columbia Pictures Corp.*, 64 N. L. R. B. 490 (1945); *Matter of The Rudolph Wurlitzer Co.*, 32 N. L. R. B. 163 (1941); *Matter of A. Sartorius and Co., Inc.*, 10 N. L. R. B. 493 (1938).

tion 9 (c).<sup>9</sup> Where none of the choices on the first ballot receives a majority, a run-off is conducted, "the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election." The NLRB under the Wagner Act had at various times different practices in conducting run-offs. Immediately before the passage of the Taft-Hartley Law, the practice was to eliminate the "neither" or "none" choice from the ballot unless it received a plurality of votes.<sup>10</sup> It would seem that the practice now compelled is uniform regardless of what the first two choices are and is in harmony with the statement in Section 7 that employees should have the right to refrain from organizational activity if they choose.

#### STATUTE OF LIMITATIONS

Section 10 (b) empowers the Board or its agent to issue complaints for unfair labor practices and has the provision "that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." No period of limitation was stated in the original National Labor Relations Act, and it has been held that the proviso has no application to complaints issued before the effective date (August 22, 1947) of the amendments to the Act.<sup>11</sup>

With respect to charges filed within six months after the effective date of the Act, it was held that complaints would issue thereon regardless of the date of occurrence of the alleged unfair labor practices.<sup>12</sup> In this way the NLRB avoided giving the limitation

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<sup>9</sup> *Matter of United States Rubber Co.*, 83 N. L. R. B. 378 (1949); *Matter of Best Motor Lines*, 82 N. L. R. B. 269 (1949).

<sup>10</sup> See N. L. R. B. Rules and Regulations, Series 4 (effective September 11, 1946), § 203.56.

<sup>11</sup> *Matter of Briggs Manufacturing Company*, 75 N. L. R. B. 569 (1947); *Matter of Detroit Gasket and Mfg. Co.*, 78 N. L. R. B. 670 (1948).

<sup>12</sup> *Matter of Augusta Chemical Company*, 83 N. L. R. B. 53 (1949); *Matter of Shawnee Milling Co.*, 82 N. L. R. B. 1266 (1949); *Matter of Old Colony Box Company*, 81 N. L. R. B. 1025 (1949); *Matter of Itasca Cotton Manufacturing Company*, 79 N. L. R. B. 1442 (1948).

proviso retroactive effect beyond the date of its effectiveness. With respect to an unfair labor practice occurring since August 22, 1947, the proviso precludes issuance of a complaint if a charge has not been filed and served within six months after the occurrence of the unfair labor practice.

#### COMPETENCY OF EVIDENCE

Section 10 (b) of the original National Labor Relations Act stated that in a complaint proceeding before the NLRB "the rules of evidence in courts of law or equity shall not be controlling." This statement is omitted from the Taft-Hartley Act, and Section 10 (b) declares that any complaint proceeding "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts . . . adopted by the Supreme Court of the United States. . . ." What the phrase "so far as practicable" means is not clear, and decisions have not yet come down explaining it.

The phrase is probably a compromise between the view that the Board should consider only "legal" evidence and the view that the Board should have discretion to consider any evidence that is relevant and reasonably reliable.<sup>13</sup> Unquestionably a restriction has been placed upon the NLRB, and, in general, it may only consider evidence which is competent in the federal district courts. The restriction arose because of the criticism that the Board was giving weight to hearsay and other unreliable evidence. It is to be noted that Section 7 (c) of the Federal Administrative Procedure Act<sup>14</sup> says that "any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence. . . ." As far as the NLRB is concerned, this section must

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<sup>13</sup> See WOLLET, *LABOR RELATIONS AND FEDERAL LAW* (1948) 15, and MILLIS AND BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* (1950) 73.

<sup>14</sup> 60 STAT. 237 (1946), 5 U. S. C. 1946 ed. § 1006.

be regarded as superseded by Section 10 (b) of the Taft-Hartley Law.

#### SUFFICIENCY OF EVIDENCE

The Wagner Act stated that the findings of the Board as to the facts, if supported by evidence, shall be conclusive. This wording has been changed under the Taft-Hartley Law to read that if the findings of the Board are supported by "substantial evidence on the record considered as a whole," then such findings shall be conclusive. In the recent case of *Universal Camera Corp. v. NLRB*<sup>15</sup> the standard of proof required of the Board was set out as being the same as that required by the courts in reviewing an administrative action subject to the Federal Administrative Procedure Act. There has been a feeling of dissatisfaction with the decisions of the judiciary that have been handed down under the Wagner Act. This feeling was engendered by the belief that any "substantial" evidence whatsoever in the record to support a finding would bring about an affirmance of the Board.

Following Congressional intent in the amended act, the reviewing tribunal must take into consideration the "whole" record to determine whether the evidence is or is not substantial. The court of appeals must be satisfied that the order of the Board rests upon adequate proof. This is not to say that the findings of the Board are not entitled to respect; but such findings must be set aside when an examination of the record discloses that the evidence is insubstantial when viewed in the reading of the record as a whole.

In the companion case of *NLRB v. Pittsburgh S. S. Company*<sup>16</sup> the question arose as to the proper scope of review by the Supreme Court in reference to the conclusion reached by the court of appeals. It was decided that the limit of review by the Supreme Court in such instances was merely to determine the fairness of the examination and evaluation of the record by the court of appeals.

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<sup>15</sup> 340 U. S. 474 (1951).

<sup>16</sup> 340 U. S. 498 (1951).